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September 15, 2009

Barry J. Zalben  
Manager  
Legislative Reference Bureau  
City Hall, Room B-11

Re: Police and Fire Services Fees for Special Events

Dear Mr. Zalben:

By letter dated June 30, 2009, you asked two questions related to the City of Milwaukee's authority to establish fees for municipal services provided for special events. First, you asked whether the City has authority to prescribe fees and an application process to recover all or partial costs incurred in police and public works services for special events. Second, you asked whether the City has authority to prescribe fees and an application process to recover all or partial costs incurred in stationing fire department staff at special events for the possible provision of emergency medical services (EMS). We answer both questions in the affirmative.

Milwaukee Code of Ordinances (MCO) § 105-55.5 governs the special event permit process while MCO § 81-114.6 establishes the fees for special events. A "special event" is defined as "any planned extraordinary, temporary use of the public right of way or public premises of 25 or more people including but not limited to parades, processions, demonstrations, bicycle or foot races, festivals and block parties." The ordinances establish the following fee structure for police services: a \$1,850 fee for Class A special events requiring more than 100 police service hours as determined by the police department based on the size, nature, and location of the event; a \$400 fee for Class B special events requiring between 25 and 99 police service hours; and \$110 for Class C special events requiring less than 25 police service hours. There is no fee for Class D special events.<sup>1</sup>

<sup>1</sup> Class D special events include the following: events requiring zero police service hours; events sponsored by the city or veterans groups; elementary and secondary school events under the direction and supervision of school authorities; and demonstrations involving free speech concerns.

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In addition, MCO § 81-114.6 sets the fees for certain public works equipment and services. There is currently no fee for the stationing of fire department staff at special events for the possible provision of emergency medical services.

It is our opinion that the City has the authority to amend the special event permits and fees ordinances to enable the City to recover expenses for police services required for maintenance of the public order at Class A through C special events. Like the current sliding scale fee structure, a cost-based fee that recovers some or all projected required police service hours would likely constitute a permissible police power license fee rather than an illegal tax. The purpose of the fee cannot be to generate revenue but to compensate the City for costs incurred in the regulation of special events. *Rusk v. City of Milwaukee*, 2007 WI App 7, ¶¶ 10-15, 298 Wis. 2d 407, 727 N.W.2d 358 (reinspection fee ordinance was a valid exercise of the City's police power because enacted for a regulatory purpose and not as a revenue generating measure).

In *City of River Falls v. St. Bridget's Catholic Church of River Falls*, the court stated as follows:

A tax is an enforcement of proportional contributions from persons and property, imposed by a state or municipality in its governmental capacity for the support of its government and its public needs. *Buse v. Smith*, 74 Wis.2d 550, 575, 247 N.W.2d 141, 153 (1976). Our supreme court explained the difference between taxes and fees: the primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities. *State v. Jackman*, 60 Wis.2d 700, 707, 211 N.W.2d 480, 485 (1973).

182 Wis. 2d 436, 442-43, 513 N.W.2d 673 (1994). See also *Milwaukee v. Milwaukee & Suburban Transp. Corp.*, 6 Wis.2d 299, 305, 94 N.W.2d 584, 588 (1959) (holding that municipal charge was a tax for revenue because, among other reasons, the City did not attempt "to show that the fees bear a reasonable relation to, or are an approximation of, the expenses suffered and the services rendered by the City directly attributable to the operation of the trackless trolley service.").

In an opinion dated May 20, 1994 (attached), we wrote:

A purported municipal "service fee" will be construed as a "tax" if it is levied upon municipal services generally available, and provided to, the public at large. Op. Atty. Gen. 12-90 (4/4/90). In such cases, the courts would likely find that the purported "service fee" is a disguised property tax and thus beyond the authority of a municipality to levy absent specific legislative authorization.

Cost-based special event fees for police and EMS services are regulatory measures rather than revenue measures notwithstanding the fact that police and EMS services are services generally available to the public at large. The City's power to license special events is derived from its police powers and the provision of police and EMS services at licensed special events are necessitated by the permit holder's extraordinary use of the public premises or right-of-way.

With regard to the stationing of fire department personnel for possible EMS services, the fact that EMS services might not actually be provided at a special event would not likely render the fee a tax. The City would recover the cost of providing department service hours to the special event and making EMS services available at the special event. In *City of River Falls*, the court rejected the church's argument that a public fire protection charge included in its municipal water bill was a tax rather than a fee because the charge was assessed regardless of whether the utility customer actually used water to fight a fire. 182 Wis. 2d at 442. The court reasoned:

The church's argument incorrectly assumes that to be a fee, a charge must be assessed for commodities actually consumed. As we previously stated, if the primary purpose of a charge is to cover the expense of providing services, supervision or regulation, the charge is a fee and not a tax. *Jackman*, 60 Wis.2d 707, 211 N.W.2d at 485.

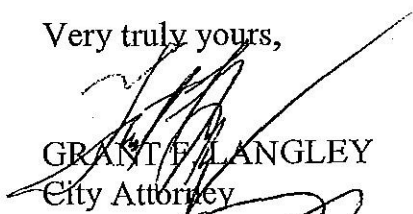
Further, state law requires that any fee imposed by a municipality "shall bear a reasonable relationship to the service for which the fee is imposed." Wis. Stat. § 66.0628. So long as the permit fees are limited to the costs incurred by the City in connection with the exercise of its police powers, we believe that the adoption of a cost-based fee structure that would recover all police and EMS services provided by the City at licensed special events satisfies this requirement.

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Finally, as noted above, the City does not currently assess fees for police services provided to special events that involve free speech concerns. Nonetheless, we take this opportunity to caution that the City cannot assess a regulatory fee based on the content of speech. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Thus, the City cannot factor into its fees the anticipated cost of restraining bystanders because a particular viewpoint or event is unpopular or may result in counter-demonstrations. *Id.* at 134. A municipality may impose a fee for police services for planned special events that involve free speech concerns only if the licensing scheme provides objective, narrowly drawn, reasonable, definite, and content-neutral standards. *Forsyth*, 505 U.S. at 131-33 (*distinguishing Cox v. New Hampshire*, 312 U.S. 569 (1941) (fee imposed for the limited purpose of meeting expenses incident to the administration of the licensing scheme and to the maintenance of public order in the matter licensed was constitutional.)). *See also, MacDonald v. Chicago Park District*, 132 F.3d 355, 362-63 (7<sup>th</sup> Cir. 1998); *Church of the American Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676 (7<sup>th</sup> Cir. 2003).

If you have any comments or concerns or require any additional information, please do not hesitate to contact the undersigned. We would like to assist in the drafting of any amended regulatory scheme.

Very truly yours,



GRANT F. LANGLEY  
City Attorney



THOMAS D. MILLER  
Assistant City Attorney

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Encl.  
c: Ronald Leonhardt, City Clerk  
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